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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

NOB HILL GENERAL STORES, INC.

Respondent/Charged Party

and Case No. 20-CA-209431

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 5

Union/Charging Party

RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

MISC.

I. PRELIMINARY STATEMENT

This matter is before the Administrative Law Judge ("ALJ") pursuant to a stipulated factual record. The record consists of a Joint Motion, submitted by the parties, which contains 25 exhibits (Exhibits A-Y) and 28 stipulated facts (some of which contain subparts).[1]

The Charging Party, United Food and Commercial Workers Union Local 5 (hereinafter "Union") and the General Counsel seek to require Respondent Nob Hill General Stores, Inc. (hereinafter "Nob Hill") to provide the Union with information concerning a new store that Nob Hill opened in the City of Santa Clara – a store at which the Union does not, and never has, represented the employees. The General Counsel seeks to compel the production of "non-bargaining unit" information.

Two issues are presented for decision:

"1. Whether Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to furnish the Union with the information it requested on September 25, 2017, identified in items 1 and 3 to 8 of the Complaint; and

2. Whether Respondent violated Section 8(a)(1) and (5) of the Act by unreasonably delaying in furnishing the Union with the information it requested on September 25, 2017..."

(Joint Motion, p. 5.)

Because there can be no "unreasonable delay" in furnishing information that the Union was never legally entitled to receive, this Brief focuses on Issue 1.[2] Under Board law, because the

[1] The "Facts" referenced in this Brief are the numbered facts in the Joint Motion and the "Exhibits" referenced are the exhibits that accompany the Joint Motion.

[2] Nob Hill repeatedly responded to the Union's information request by stating that, for the most part, it would not provide the requested information and gave its *detailed* reasons for refusing the

information sought does not involve "unit" employees it is *not* presumptively relevant. Therefore, to prevail, the General Counsel must demonstrate the relevance of the information to the Union's statutory responsibilities, be it *contract administration or collective bargaining*.

However, *because by its express terms*, the Union's contract with Nob Hill had no applicability to the new store (and the one contractual provision that was potentially applicable had no applicability until the store was opened to the public for 15 days), there were no contractual provisions to "administer" at the time the Union made its request. Nor was the requested information relevant to the Union's "bargaining" responsibilities where (1) as a factual matter there was no adverse effect on the bargaining unit as a result of the new store opening; (2) the Union never identified any such adverse effect; (3) the Union never requested that Nob Hill engage in "effects bargaining"; and (4) the requested information had no relevance to any such bargaining.

Finally, even assuming *arguendo* that the requested information, or some of it, concerned the bargaining unit, such that the requested information was "presumptively relevant", that presumption was rebutted where the evidence proves that no contractual provision was applicable to the Santa Clara store, when the Union made its request, and where Nob Hill *offered* to consider any request made at the appropriate time, or more specifically, after the store had been opened to the public.

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request. (Exhibits L, O, and Q.) Accordingly, Nob Hill complied with the Board's requirement that it respond to the request, even if the response is to deny the request. *E.g. IronTiger Logistics, Inc.*, 359 NLRB 236, 237 (2012).

The General Counsel separately alleges, that with respect to two "unnumbered" requests in the Union's September 25th letter, Nob Hill unreasonably delayed in responding to those requests (although Nob Hill did provide the information). (Fact 17; Exhibit E, ¶ 9(c).) Because it is Nob Hill's position that it had no obligation to furnish this information, the issue of delay, with respect to these two unnumbered requests, will not be independently discussed other than to note that the information was provided to the Union *a month before the Santa Clara store opened to the public*. (Facts 17 and 22.)

To prevail, the General Counsel will ask the ALJ to disregard established Supreme Court precedent concerning the meaning of the parties' collective bargaining agreement. Only by ascribing to the parties' contractual language a unique and special meaning, in contravention of common law principles of contract interpretation as enunciated by the Supreme Court, can the General Counsel tie the Union's information request to the parties' contract.

II. STATEMENT OF FACTS

A. Nob Hill's Structure.

Nob Hill operates retail food stores in Northern California. (Fact 3.) As of the Fall of 2017, Nob Hill operated 19 retail stores. (Exhibit W.) Of these 19 stores, the Union represented *all* of the employees working in 13 stores. *Id*. In 5 stores, the Union represented the employees working on the "grocery" side of the store while a sister local, United Food & Commercial Workers Union Local 8, represented the employees working in the meat department of those stores. *Id*. The remaining Nob Hill store was located in Stanislaus County, outside of the Union's geographic jurisdiction. The employees in that store are unrepresented. *Id*. All of the Nob Hill employees represented by the Union, regardless of location, were subject to one, all-inclusive, collective bargaining agreement (hereinafter "CBA"), the term of which ran from October 12, 2014 through October 11, 2017 but which was extended by the parties to February 8, 2018. (Fact 8; Exhibit J.)

Nob Hill is part of a larger corporate retail family that operates food stores throughout Northern California and Nevada under various "banners" including the names Nob Hill, Raley's, Bel Air, and Food Source. (Fact 3.) At these non-Nob Hill bannered stores, the Union represents some or all of the employees in the store, or its sister Local 8 represents some or all of the employees in the store, or some or all of the employees in the stores are unrepresented.

(Exhibit W.)[3]

Regardless of how these various stores are "bannered" to the public, Raley's, a California corporation, provides support services to all of the stores, including labor relations and human resource services. (Fact 3.) As a result, all of the employees, regardless of the stores in which they work, have access to an "employee intranet website", maintained by Raley's, that notifies employees of internal job openings that exist in all of these stores and that solicits applications for transfer. (Fact 10.) Any employee, in any bannered store, may apply for any posted job opening. (Facts 10, 23, and 27B.)

B. <u>The Union's Request For Information And Nob Hill's Response.</u>

Nob Hill determined to open a new retail store in Santa Clara, California, within the Union's geographic jurisdiction and initially scheduled the opening for October 2017. (Fact 11.) The opening was delayed, and the store ultimately opened to the public on January 10, 2018. *Id*.

By letter dated September 25, 2017, the Union wrote to Mark Foley, Raley's Executive Vice-President and Chief People Officer, and requested that Nob Hill provide the Union with information concerning the Santa Clara store. (Fact 12; Exhibit K.)[4] The Union requested:

> "1. ...a list of the classifications and the number of employees in each classification to be initially hired in the [Santa Clara] store... and how many in each classification will be full time... and part time.

[3] For example, of the eight "Food Source" bannered stores, two are within the Union's jurisdiction, and of those two, the Union represents all of the employees in one store and none of the employees in the other store. (Exhibit W.)

[4] Because Raley's provides human resource and labor relations services to Nob Hill, the communications between the parties interchangeably referred to Raley's and/or Nob Hill.

2. [*Omitted -- the failure to provide is not alleged to be a violation of the Act*.][5]

3. ...a list of those employees who are currently working in the bargaining unit who have been asked to work in the new store...and the dates they were asked to work in the store.

4. ...a list of current employees who have indicated their willingness to work in the store or who have agreed to work in the store [and] provide the classifications they will be working in and the wage rate promised them.

5. ...a copy of any employee handbook that you intend to apply to the employees...

6. ...a statement of the ranges of rates to be paid to each classification...

7. ...a copy of any benefit plans to be applicable..."

8. ...when will the employees begin actually working in the store [and] what is the projected opening date.

[Unnumbered 9] ...whether employees who are currently working in the bargaining unit may transfer into the store and under what circumstances.

[Unnumbered 10] Local 5 has members working short hours, not working or who are otherwise available to work...Please advise Local 5 of how we can make

[5] Omitted item 2 sought the same information as Item 1 except that it sought it for a date two and six months after the store had been open to the public. The General Counsel dismissed that portion of the charge as "premature" because the store was not yet open *and because there was no certainty that the Union would be the employees' bargaining representative at the relevant time*. (Exhibit V.) In addition, the Union demanded that Nob Hill allow Union representatives to access the new store. The General Counsel dismissed this allegation on the basis that Nob Hill had provided a substantive response denying the Union's request and concluding that the Union had no right of access. (Exhibits V and Y.)

arrangements for them to be hired." (Exhibit K.)[6]

The Union stated that the information was necessary "in order for Local 5 to administer the contract and to bargain over the effects of the opening of this store". *Id*. Nowhere in its letter did the Union identify how the opening of the Santa Clara store *adversely affected the bargaining unit nor did it request that Nob Hill engage in effects bargaining*. Although the Union also did not explicitly specify how the requested information would allow it to administer the CBA, it did assert that the following contractual provisions of the CBA "apply to the opening of this store": 1.14 (New Jobs), 2.4 (Other Hiring), 2.5 (New Employee), 4.3.4 (Recall), 4.9 (Transfers), 4.10 (Part Time Employees), 5.9 (Union Business) and other [unspecified] provisions. (Exhibit K.)[7]

By letter dated October 18, 2017, Nob Hill responded to the Union's demand by noting that although the Union had asserted that it needed the requested information "to administer the contract", its demand ignored the *express language* in the CBA stating that the CBA had no applicability to the new store until it had been open to the public for 15 days. (Exhibit L.) Nob Hill advised the Union that, in light of that restrictive proviso, Nob Hill declined to provide the requested information. However, Nob Hill added that *when the store had been open to the public for 15 days, it would "consider any [information] requests made at that time*". *Id*.

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[6] As noted, Nob Hill did provide the Union with the information it requested in its two unnumbered requests, but the General Counsel alleges that Nob Hill violated the Act by delaying its response. (Fact 17; Exhibit E ¶ 9(c).)

[7] These contractual provisions will be discussed in greater detail *infra*, pp. 30-44. However, because Nob Hill's position is that these contractual provisions have no applicability to the Santa Clara store, their substance is ultimately irrelevant. At this juncture, it is sufficient to note that except for the reference to section 5.9 of the CBA, all of the sections cited by the Union concern the new jobs in the Santa Clara store potentially available to unit employees. Section 5.9 concerns "union business", such as allowing unit employees to attend negotiations and that contractual section does not have any relationship, no less a relevant relationship, to the requested information.

By letter dated October 31, 2018, the Union responded by stating that the CBA had provisions (presumably relying on Section 1.13 of the CBA) "regarding the staffing of new stores" and requiring "the continuation of Trust Fund contributions for employees who move into the new store" and that, therefore, Nob Hill was "incorrect" in asserting that the CBA did not apply. (Exhibit M.)

Nob Hill did not respond to the Union's October 31 letter, prompting a December 5, 2017 letter from the Union in which the Union asserted that Nob Hill's reliance on the proviso precluding the CBA from applying to a new store was misplaced in that it ignored the "staffing language" contained in the CBA that allowed current unit employees to staff the new store, thereby protecting the current bargaining unit. (Exhibit N.) The Union again asserted that it needed the information to administer the CBA; this time citing Sections 1.14 (New Jobs), 1.1 (Recognition), 1.11 (Individual Agreements), 1.13 (New Stores and Remodels), and 2.6 (Extra Work). *Id*. The Union also asserted that Nob Hill was seeking to discriminate against bargaining unit members who wanted to transfer to the new store and that there were "many" such members who sought transfer. *Id*.[8]

By letter dated December 13, 2017, Nob Hill's attorney provided a detailed response to the Union. (Exhibit O.) In that response, Nob Hill reiterated (1) that the parties' CBA could have no applicability to the Santa Clara store because Section 1.13 of the CBA expressly states: "Notwithstanding any language to the contrary contained in this Agreement between the parties, it is agreed this Agreement shall have no application whatsoever to any new food market or

[8] As with many of the Union's assertions, this assertion was false. *All bargaining unit members were given an opportunity to apply for transfer*. (Facts 10, 23.) A total of 10 unit employees actually requested a transfer. (Fact 23.) Of those 10, Nob Hill offered to transfer 9 unit employees. (Facts 10, 23, and 25.) Moreover, the Union was fully aware that Nob Hill *was encouraging unit employees to seek a transfer*, and the Union urged its members to apply for a transfer. (Exhibit U.)

discount center until fifteen (15) days following the opening to the public of any new establishment." Nob Hill went on to note that the Union's apparent reliance on language in the CBA requiring Nob Hill to staff the store with a "cadre" of current employees was unavailing because *that language did not require that the "cadre" consist of bargaining unit employees nor had any United Food and Commercial Workers Union local ever asserted that the cadre language was so limited*. *Id*. Nob Hill acknowledged that after the Santa Clara store was open to the public for fifteen days, the cadre language would impose a "look see" obligation upon Nob Hill to ascertain whether Nob Hill had complied with its staffing obligation, but that the CBA did not impose any *current and existing* staffing obligation on Nob Hill. *Id*.

In addition, while reserving its legal position that it had no *current* obligation to provide the Union with any information concerning the staffing of the Santa Clara store, Nob Hill responded to some of the Union's factual inaccuracies and advised the Union (1) that beginning in early August, Nob Hill, through various means including posting notices in its stores, had notified the bargaining unit employees that there were job openings available in the Santa Clara store and had solicited them to apply, (2) that Nob Hill had considered for transfer each and every bargaining unit employee who requested a transfer, and (3) that the Union had more than an adequate opportunity to encourage its members to seek a transfer. *Id*. Nob Hill also pointed out that the Union was already aware of these facts because the Union's President, John Nunes, had posted a notice on the Union's web site stating that Nob Hill was soliciting and encouraging bargaining unit members to apply for positions at the Santa Clara store. *Id*.

By letter dated December 19, 2017, the Union responded by asserting that Nob Hill's interpretation of the "notwithstanding" clause in the CBA was erroneous because it meant that the CBA imposed no staffing requirement on the new store which was not a "reasonable"

interpretation of the CBA. *Id*.[9] Additionally, the Union noted that the CBA imposed additional requirements on Nob Hill, specifically, an employee probationary period for "newly hired employees" and the continuation of trust fund contributions on behalf of transferred bargaining unit members.

By letter dated December 23, 2017, Nob Hill responded that its position remained as previously stated. (Exhibit Q.)

By email communication dated December 27, 2017, Nunes, the Union's President, wrote to Raley's expressing his concern that recruiters were informing job applicants that the Santa Clara store would open "non-union" asserting that such comments were intended to discourage Union members from applying for the jobs. (Exhibit R.)[10] In addition, Nunes claimed that the

[9] While this issue is discussed in greater detail *infra*, pp. 39-41, it should be noted that the Union's claim is wrong. Nob Hill never asserted that the CBA did not impose a staffing obligation with respect to the new store. Nob Hill acknowledged that, under Section 1.13 of the CBA, it was required to use a cadre of current employees (but not necessarily, or exclusively, bargaining unit employees) to staff the Santa Clara store but that such an obligation only existed *after* the store had been open to the public for 15 days and, only at that point, was the Union free to ascertain whether Nob Hill had complied with its contractual obligation. How that "cadre" was obtained was solely up to Nob Hill. It was only on the 15th day that the Union could assert any contractual right to ascertain whether the cadre was working in the new store. In other words, *at the time of the Union's information request*, Nob Hill had no existing contractual obligation to do anything.

[10] Under the terms of the stipulated record (Joint Motion, p. 2), the ALJ can take administrative notice that no charge was ever filed alleging that Nob Hill (or Raley's) made any unlawful statements concerning the status of the Santa Clara store. Moreover, as a legal matter, until and unless a majority of the employees in that store chose the Union as its representative the store would be non-union. Similarly, no charge was ever filed alleging that Nob Hill took any action to dissuade Union members or unit employees from seeking a job in the Santa Clara store. In truth, the evidence is to the contrary in that Nob Hill considered for transfer every unit employee who sought a transfer, and ultimately granted all, but one, of the transfer requests. (Fact 23.) Additional evidence that Nob Hill was encouraging unit employees to transfer is shown by the fact that in unit stores a "physical" notice was posted advising unit employees of the transfer opportunities. No such notices were posted in non-unit stores. (Fact 10; Exhibit S.)

Union needed the requested information in order to monitor the employee transfer process to ensure that the process was "performed in a fair and equitable manner consistent *with the terms of the Union agreement*." *Id*. (emphasis added.) Nunes also claimed that the Union needed the information to advise its members of the "pitfalls" of accepting a transfer to the Santa Clara store should it be a non-union operation. *Id*.

The parties did not engage in any further written communications regarding this matter. Instead, the General Counsel issued a Complaint alleging that Nob Hill failed to provide the Union with relevant information. (Exhibit E.) The Complaint alleges that Nob Hill is required to furnish items 1 and 3-8 listed in the Union's September 25, 2017 letter, and separately, that Nob Hill delayed in furnishing the Union with the information it had demanded in its two unnumbered September 25th requests. (Exhibit E, ¶9(b) and (c).)

The General Counsel dismissed that portion of charge that sought information listed as "item no. 2" and an unnumbered request asking whether Nob Hill would allow union representatives into the Santa Clara store. (Exhibit V.) This dismissal is relevant because the General Counsel concluded that the Union was not entitled to information concerning the staffing of the Santa Clara store two and six months after it was opened to the public (1) because the request was premature in that the store was not yet open, and (2) because it was not clear that the Union, at such time, would be the employees' bargaining representative. *Id*.

C. <u>The Lack Of An Adverse Effect On The Bargaining Unit.</u>

Although the Union's *initial* information request asserted that the opening of the Santa Clara store would have an "adverse effect" on the bargaining unit, it never identified what that effect would be or how the requested information was relevant to the supposed effect nor did the Union demand that Nob Hill engage in any effects bargaining. Other than referencing "effects

bargaining" in its initial communication, the Union never again asserted that it needed the requested information for that purpose.

During the pendency of the Union's information requests no unit employee was on "layoff" status. (Fact 26.) The opening of the Santa Clara store did not cause any unit employee to be laid off nor has it resulted in the reduction of any unit employee's work hours. *Id.* Moreover, any work hours vacated by unit employees (who transferred to the Santa Clara store) were given to other unit employees. *Id*.

Unit employees were advised of the availability of transfer opportunities in the Santa Clara store both through the posting of physical notices in their respective stores and through the intranet website maintained by Raley's and available to all unit employees. (Fact 10.) All unit employees, as well as non-unit employees, were free to apply for a transfer. (Fact 23.)

Ten unit employees requested a transfer. Id. Nine of the ten requests were granted. *Id*. Of the nine requests granted, seven individuals accepted transfer to the Santa Clara store. *Id*. In addition, three non-unit employees, who had also applied for a transfer to the Santa Clara store, transferred into the store. (Fact 23.) *No unit or non-unit employee was involuntarily transferred into the Santa Clara store*. (Fact 24.) The remaining Santa Clara employee workforce consisted of forty-seven new hires. (Fact 24.)

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D. <u>The Parties' Past Practice.</u> [11]

Prior to the opening of the Santa Clara store, Nob Hill operated eighteen Nob Hill bannered stores in the Union's jurisdiction. (Exhibit W.) At eighteen of these stores, the Union represents all, or most, of the employees working in the stores. *Id*. The Santa Clara store was hardly the first new store added to the Nob Hill family of stores. The "staffing" past practice followed with respect to these previous store openings has been uniform and consistent: (Fact 28.)

(1) The "cadre" (as that term is used in Section 1.13 of the CBA) of current employees that staffed the new store came from individuals who *voluntarily* sought a transfer into the new store. The cadre consisted of unit employees *and non-unit employees*.

(2) All employees then working in the Raley's, Nob Hill, Bel Air, and Food Source stores (listed in Exhibit W) were notified of the transfer opportunity and given the opportunity to request a transfer. All employees who requested a transfer were considered.

(3) No employee, whether unit employee or non-unit employee, was involuntarily transferred into the new store.

(4) The Union never filed a grievance alleging that these staffing practices violated the CBA. The Union never asserted that the cadre language in Section 1.13 meant that Nob Hill was required to obtain the cadre from bargaining unit members.

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[11] In interpreting *ambiguous* contractual terms, parole evidence and/or past practice may be relevant. As discussed *infra*, pp. 36-37, Nob Hill does not believe the contractual terms at issue in this case are ambiguous. Quite to the contrary, under well-established principles of contract interpretation, the terms are clear and unambiguous, and therefore, resort to parole evidence or past practice is unnecessary, inappropriate, and improper. *See generally* Elkouri and Elkouri, *How Arbitration Works* (8th Ed. 2016) pp. 8-38, 12-24 -12-27. However, in the event that an ambiguity was found, the relevant past practice supports Nob Hill's contract interpretation, and for that reason, is briefly summarized. Significantly*, in this evidentiary record, there is no parole evidence or past practice that supports the General Counsel's contractual interpretation argumen*t.

(5) *The Union never filed a request with Nob Hill seeking any type of information concerning a new store prior to the date the store opened to the public.*

III. ARGUMENT

A. AN EMPLOYER IS ONLY REQUIRED TO FURNISH RELEVANT INFORMATION, AND THE BOARD HAS CLEARLY HELD THAT INFORMATION IS NOT RELEVANT FOR CONTRACT ADMINISTRATION OR BARGAINING WHERE THE PARTIES' CONTRACT PRECLUDES THE CLAIM OR CLAIMS THE UNION SEEKS TO MAKE OR WHERE THE CONTRACT AFFIRMATIVELY AUTHORIZES THE EMPLOYER'S CONDUCT.

The duty to furnish information turns on the "circumstances of the particular case". *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956). "The key question in determining whether information must be produced is one of relevance." *Crowley Marine Services, Inc.*, 329 NLRB 1054, 1060 (1999).

1. IN ORDER TO BE RELEVANT, THE UNION'S INFORMATION REQUEST MUST BE NECESSARY FOR THE UNION TO PERFORM ITS STATUTORY DUTIES.

To prevail, the General Counsel must prove that the requested information is relevant either "to the union's performance of its duties to administer and police the CBA or to negotiate...(or both)." *General Electric Co. v. NLRB*, 916 F.2d 1163, 1168 (7th Cir. 1990) citing *NLRB v. Acme Industrial Co*., 385 U.S. 432, 437 (1967); and *see also Southern California Gas Company*, 342 NLRB 613, 614 (2004). Ultimately, it must be proven that the requested information is relevant to *the union's statutory duties*. For example, when a union seeks information to pursue an unfair labor practice charge or a complaint with a state agency such a request is not relevant to the union's statutory duties (even though the union's action may have an impact on the bargaining unit). *Id*. at 615; and *see WXON-TV, Inc*., 289 NLRB 615 (1989) *enf'd* 876 F.2d 105 (6th Cir. 1989). An employer has no obligation to provide information that the Union seeks for a non-statutory purpose. *Id*.

"Where a union requests information concerning the terms and conditions of employment

of bargaining unit employees, that information is 'presumptively relevant' to the union's proper performance of its collective bargaining duties." *Southern California Gas Company*, *supra*, 342 NLRB at 614. However, and significantly, the presumption is rebuttable. *Id*. at 616 ("...even assuming that the information was presumptively relevant, the presumption has been rebutted."); and *see IronTiger Logistics, Inc., supra*, 359 NLRB at 237. When relevance is rebutted, the union is required to show the exact relevance of its request. *Fairfield Daily Republic*, 275 NLRB 7, 9 (1985).

Conversely, "a request for information pertaining to matters outside the bargaining unit is not 'presumptively relevant' and relevance *must be established by the requesting party*." *Delaware County Memorial Hospital*, 366 NLRB No. 28, p. 7 (2018) (emphasis added); and *see also International Union of Operating Engineers, Local 501* (Golden Nugget), 366 NLRB No. 62 (2018) citing *Shoppers Food Warehouse Corp*., 315 NLRB 258, 259 (1994). The union must demonstrate the relevance of its request or the relevance must be apparent under the circumstances. *IGT d/b/a International Game Technology*, 366 NLRB No. 170, p. 2 (2018); and *see also Disneyland Park*, 350 NLRB 1256, 1258 (2007). "The union has the burden of establishing that the [requested] information is necessary to the performance of its representational responsibilities. *NLRB v. Postal Service*, 18 F.3d 1089, 1011 (3rd Cir. 1994) (citing *Ohio Power Co*., 216 NLRB 987, 991 (1975) *enf'd* 531 F.2d 1381 (6th Cir. 1978); and *see generally NLRB v. Acme Industrial Co., supra,* 385 U.S. at 435.

An actual, *not theoretical or speculative*, connection between the requested information and the Union's bargaining and/or representational responsibilities must be shown." *International Union of Operating Engineers, Local 501 (Golden Nugget)*, *supra,* 366 NLRB at p. 5. A specific and concrete need for the information must be established. *F.A. Bartlett Tree Expert Co*., 316 NLRB 1312, 1313 (1995). And significantly (especially in this case), *relevance is judged as of the date the*

union makes its request. *E.g., Kraft Foods North America, Inc.*, 355 NLRB 753, 755 (2010).[12]

2. <u>HERE, THE UNION SOUGHT NONUNIT INFORMATION AND WAS REQUIRED TO DEMONSTRATE THE RELEVANCE OF THE REQUESTED INFORMATION TO THE PERFORMANCE OF ITS STATUTORY DUTIES.</u>

Based on these established principles, the Union's request to Nob Hill must be broken down into requests for unit information and requests for nonunit information. Not only were most of the Union's request for nonunit information, but even those requests that appear, at first glance to concern the unit, are, in reality, requests for nonunit information. Of the nine requests, the following six clearly concerned nonunit issues, to wit, *what would occur at the Santa Clara store*:

> "1. ...a list of the classifications and the number of employees in each classification to be initially hired in the [Santa Clara] store... and how many in each classification will be full time... and part time.
>
> 5. ...a copy of any employee handbook that you intend to apply to the employees...
>
> 6. ...a statement of the ranges of rates to be paid to each classification...
>
> 7. ...a copy of any benefit plans to be applicable..."
>
> 8. ...when will the employees begin actually working in the store [and] what is the projected opening date.
>
> [Unnumbered 10] Local 5 has members working short hours, not working or who are otherwise available to work...Please advise Local 5 of how we can make

[12] The General Counsel is not free to manufacture a *post hoc* theory of relevance. *Calamat Co*., 283 NLRB, 1103, 1106 (1987); and *see Sara Lee Bakery Group v. NLRB*, 514 F.3d 422, 431 (5th Cir. 2008). The General Counsel may not rely upon reasons "that were not brought to the employer's attention". *NLRB v. AS. Abell Company*, 624 F. 2d 506, 513 n. 5 (4th Cir. 1980).

arrangements for them to be hired.[13]

The above six requests pertain to the opening of the Santa Clara store and the terms and conditions that would be applicable to the employees working in that store. These requests did not seek any information concerning the bargaining unit. In contrast, three of the Union's information requests seemingly concern the unit because they request information *about* unit employees, to wit:

> 3. ...a list of those employees who are currently working in the bargaining unit who have been asked to work in the new store...and the dates they were asked to work in the store.
>
> 4. ...a list of current employees who have indicated their willingness to work in the store or who have agreed to work in the store [and] provide the classifications they will be working in and the wage rate promised them.
>
> [Unnumbered 9] ...whether employees who are currently working in the bargaining unit may transfer into the store and under what circumstances.

While these last three requests appear to concern unit employees, the requests do not concern the employees' employment *within the bargaining unit*. All three requests concern whether the unit employees have sought employment *outside of the bargaining unit* and the date on which they would

[13] Unnumbered request 10 does not concern unit employees because at the time of the request, and thereafter, no unit employees were on layoff status. (Fact 26.) Indeed, on its face, the Union is referencing its members, and not unit employees, and is referring to such individuals being hired, *not transferred*. A request seeking information concerning how *non-unit employees* could obtain work in a store, *that was not presently part of the bargaining unit*, cannot "concern unit employees". If, nonetheless, the Union's request were misinterpreted to include unit employees who were working less than 40 hours per week (e.g., short hours) it would be duplicative of the Union's second "unnumbered request", to be discussed next, wherein the Union sought information concerning how unit employees could seek a transfer to the Santa Clara store.

commence working outside of the unit.[14]

If none of its requests seek bargaining unit information, the Union was required to establish the relevance of its requests.[15] In its initial communication, the Union set forth the basis for its requests:

> "In order for Local 5 to administer the contract and to bargain over the effects of the opening of [the Santa Clara] store, Local 5 requests some information." (Exhibit K.)[16]

In support of its contract administration assertion, the Union claimed that "various provisions of the collective bargaining agreement [citing Section 1.14, 2.4, 2.5, 4.3.4, 4.9, 4.10, 5.9 and

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[14] If Nob Hill *involuntarily transferred* a unit employee to the Santa Clara store, the Union might be able to assert that these three requests concerned the unit because even though the CBA would have no applicability to the new Santa Clara store the CBA might prevent an involuntary transfer *of any kind, be it to a new store or an existing unit store or an existing non-unit store.* In other words, such a contractual prohibition would not concern the applicability of the CBA to the Santa Clara store but rather would concern Nob Hill's right to transfer, *involuntarily*, a unit employee, regardless of the store involved. In that case, the information could be relevant to demonstrate whether Nob Hill was complying with the contract and/or whether a grievance should be filed. However, no such argument to support "relevance" can be made here because Nob Hill did not involuntarily transfer any unit employees into the Santa Clara store and *the Union never claimed that Nob Hill was violating the CBA by involuntarily transferring unit employees into the store*. (Fact 24.) Therefore, this *theoretically possible* transfer dispute was not a "stated ground" establishing the relevance of the information sought, and the General Counsel cannot now use such an argument to justify the Union's information request. *See Disneyland Park*, 350 NLRB1256, 1259 (2007) (In evaluating the relevance of the Union's information request, the Board noted: "...the union never made the claim that any subcontracting had that evasive purpose."); and *see also IronTiger Logistics, Inc., supra*.

[15] While it is Nob Hill's position that none of the requests seek bargaining unit information, ultimately, it is not necessary to reach that conclusion. Even assuming *arguendo* that some or all of the requests concerned the unit, and therefore were presumptively relevant, the analysis that follows rebuts the presumption of relevance.

[16] In this same letter, the Union also seemingly claimed that Nob Hill had an obligation to bargain over its decision to open the store ("Nob Hill has not sought to negotiate over this opening...") (Exhibit K.). As with its "effects bargaining" claim, the Union never follow up on this claim, and as a matter of law, Nob Hill had no statutory obligation to bargain over its managerial decision to open a new store. *See generally First National Maintenance v. NLRB*, 452 U.S. 666 (1981).

unspecified "other" provisions] apply to the opening of this store". *Id*. The Union claimed that, under its CBA with Nob Hill, unit members were contractually entitled to staff the new store. Union President Nunes made it crystal clear that the Union believed that CBA provisions afforded unit members the *contractual* right to staff the new store and that the contractual provisions he had enumerated were applicable to the Santa Clara store.

> "...[W]hen new stores open there are many additional opportunities afforded current employees and Local 5 members *with a process* in which to attain those opportunities contained *in the collective bargaining agreement*. Some of these opportunities would include job transfers so employees may work closer to their homes, promotions, additional full-time positions and more work hours for part-time employees to name a few. It is the duty of the Union to monitor these matters and make sure they are performed in a fair and equitable manner *consistent with the terms of the Union agreement.*"
>
> (Exhibit R) (emphasis added.)

In follow-up communications, the Union asserted that additional CBA provisions applied to the Santa Clara store asserting that the CBA had provisions regarding "the staffing" of the new store and required the continuation "of Trust Fund contributions for employees who move into the new store". (Exhibit M.) The Union then claimed that it also needed the information to administer Section 1.14 (which it had previously referenced) as well as Sections 1.1, 1.11, 1.13 and 2.6. (Exhibit N.)

3. TO PROVE RELEVANCE, THE BOARD REQUIRES THE UNION TO SHOW *SPECIFIC FACTS* SUPPORTING A *VIABLE CLAIM* FOR BREACH OF CONTRACT UNDER *AN APPLICABLE CONTRACTUAL PROVISION.*

If the parties' CBA expressly precludes *all* of these cited contractual provisions from being applicable to the Santa Clara store, then the Union's information request is not relevant, for absent a viable, extant contractual provision, nothing in the Act requires Nob Hill to consult with the Union with respect to how Nob Hill staffs a new store. *Plainly stated, the existence of a valid, applicable*

contractual provision is the "touchstone" for relevance. If no contractual provision is applicable, then there is nothing for the Union to administer. The Union cannot simply reference a contractual provision to justify its information request. *The Union (and now the General Counsel) must show that there is potential breach that requires administration.*

This is precisely what the Board held in *Disneyland Park, supra*. In *Disneyland Park*, the union sought a list of subcontractors performing work for the employer asserting that it needed the information in order to administer the following contractual provision: "During the terms of the Agreement, the Employer agrees that it will not subcontract work for the purpose of evading its obligations under this Agreement. However, it is understood that the Employer shall have the right to subcontract...where the subcontracting of work will not result in the termination or layoff, or the failure to recall from layoff, any permanent employee..." 350 NLRB at 1256.

In making its information request, the Union acknowledged that no employee had been laid off as a result of subcontracting but asserted that at least one employee had retired and had not been replaced and that an additional steward had not been hired. Thus, the union contended "Disneyland is reducing its work force and subcontracting additional work." *Id*. The Board concluded that Disneyland had no obligation to produce the requested information because the union had failed to set forth *specific facts* showing a *potential* contractual breach. The Board held:

> "Pursuant to section 23 of the collective-bargaining agreement, the Respondent could subcontract, provided that the subcontracting did not result in a termination, layoff or a failure to recall unit employees from layoff. However, the Union made no such claim. The Union explained only that it "observed that there (have) been a number of subcontracts within Disneyland for work covered by the agreement"; that it believed there had been an increase in subcontracts; and that "at least one iron worker has retired and not been replaced [and] no new steward has been hired at the theme park (thus) (i)t is plain that Disneyland is reducing its workforce and subcontracting additional work." We find these explanations insufficient, under the circumstances, to explain the relevance of the requested subcontract information. There was no claim that any employee had been terminated or laid off, and no claim that any employee, previously laid off, had not been recalled. Further, there was no claim that any such action was caused by subcontracting. Given that the unit appears to be

> sizeable, the Respondent's failure to hire a replacement for one retiring employee does not, by itself, reasonably suggest that the Respondent was not honoring the collective-bargaining agreement. *In order to show the relevance of an information request, a union must do more than cite a provision of the collective-bargaining agreement. It must demonstrate that the contract provision is related to the matter about which information is sought*, and that the matter is within the union's responsibilities as the collective bargaining representative. Here, it has not been shown that the Union had *a reasonable belief supported by objective evidence* that the information sought was relevant. Therefore, we find that the Union failed to meet its burden. "
>
> *Id*. at 1256. (additional emphasis added.)

The Board went on to make clear that while a union is not required to prove a breach of the contract, "...the union *must claim* that a specific provision of the contract is being breached and must set forth at least *some facts* to support that claim." 350 NLRB at 1259 (additional emphasis added.)

Where the parties' contract *precludes* the union from filing any sort of grievance or making any sort of contractual claim, then the union's information request cannot concern an issue of "contract administration". For example, in *Connecticut Yankee Atomic Power Co*., 317 NLRB 1266 (1995) the union asserted that the employer might be using non-bargaining unit employees to perform work covered by its contract either by using, or by owning and operating, a non-union company to do the work. The union requested "extensive information" regarding the relationship between the employer and the non-union company. The employer responded that it had no financial or management connection with the other company and that "the nature of the contracting relationship between [the two] was well known to the Union." The union again demanded the information asserting that it needed the information to determine whether a grievance *should be filed* because the union believed that the two entities might constitute a joint employer.

After finding that the potential issue of the presence of a joint employer relationship failed to establish the relevance of the union's information request, the Board went on to hold that *the*

contractual language precluded the General Counsel's alternative argument that the information was relevant for contract administration stating:

> "We further reject the General Counsel's position that the Union's stated concern about potential erosion of unit work effectively made its information request relevant to the Union's articulated desire 'to determine the appropriateness of a grievance and/or to determine whether these matters can be resolved in negotiations in a timely manner.' As noted above, *article XXII of the 1993-1996 contract, as well as past contracts, permits* the Respondent to subcontract unit work to outage contractors unless this arrangement results in the 'loss of continuity of employment or opportunities for permanent promotions' for unit employees. The evidence submitted was insufficient *to support a reasonable belief* that the Respondent's use of the [subcontractor] *contravened the specific conditions placed on Respondent's ability to unilaterally subcontract work*..."
>
> 317 NLRB at 1268. (emphasis added.)

Here, again, mere reference to a contractual provision to demonstrate relevance is legally insufficient if the contractual provision precludes the union's argument. In other words, a union is not entitled to information to assert a potential violation of the CBA *where the contract permits the action that the union may seek to challenge*.

Similarly, in *Kennametal, Inc*., 358 NLRB 553 (2012) the employer instituted a "safety checklist". When an employee was threatened with discipline for failing to comply with the checklist requirement, the union demanded to bargain over the checklist *and its effects* and requested "any and all information" concerning the checklist procedure. While the Board acknowledged that the use of a safety checklist was a mandatory subject of bargaining and the requested information was presumptively relevant, it concluded that the employer had no obligation to comply with the information request because*, under the specific terms of the CBA*, the Union had waived its right to bargain over the employer's implementation. The Board stated:

> "Read together these two [contractual] provisions are sufficiently specific to constitute a waiver over the Union's right to bargain over safety rules. ... When a union waives its right to bargain over a change to a term or condition of employment, however, it is no longer entitled to information requested for that purpose."

Id. at 555.[17]

The Board has made it crystal clear that it will look at the parties' collective bargaining agreement to determine whether the union's request has *a viable and valid* contractual basis before finding requested information to be relevant to a contract administration or bargaining claim. Thus, in *American Stores Packing Company*, 277 NLRB 1656, 1658 (1986), the Board held:

> "We will give effect to the plain meaning of the language in the letter of intent, which we find granted the [employer] the right unilaterally to remove all bargaining unit work. Thus, the Union waived any right it may have had to bargain about the [employer's decision] to close the plant and subcontract unit work [citing *Emery Industries*, 268 NLRB 824 (1984)]. Accordingly, the Union had no right to information requested for bargaining on the subject."

See also IronTiger Logistics, Inc, supra, 359 NLRB at 242 ("...the information concerning the assignment, destination, and miles driven by the drivers assigned to IronTiger loads was unrelated to the grievance relating to failure to place all loads on the IronTiger kiosk. ... The Union had made no complaint, filed no grievance, or made any claim that any IronTigers were improperly paid. The information relating to assigned driver, destination, and distance was not relevant.")

In sum, the Board does not merely rubber stamp a union's relevance claim because the union can point to *some* contractual language that, *in the abstract*, might be applicable. The Board requires more. It looks at the contract to determine if the union can raise a *viable* claim on which to bargain or administer its contract and whether the union has *objective evidence* supporting its claim.

Here, as will be shown, the Union contractually *waived* its right to enforce all of the contractual provisions upon which it relied for its information request. Moreover, in its repeated

[17] Because, in *Kennametal*, the union had stated an alternative relevant basis for the requested information, the Board found that the employer was required to provide the information.

requests, the Union set forth *no specific facts* showing any potential contractual violation. In the absence of specific facts or a viable, extant contractual provision, the Union's information request was not related to any need to administer the CBA. *Disneyland Park, supra*.

B. BY ITS EXPRESS AND UNAMBIGUOUS TERMS, THE CBA STATED THAT IT HAD NO APPLICABILITY TO A NEW STORE, AND THEREFORE, THE CONTRACT CANNOT BE USED BY THE UNION TO SHOW THAT IT WAS SEEKING TO ADMINISTER A NON-EXISTENT CONTRACT PROVISION.

The Union's information request was premised on its supposed to need to administer eleven contractual provisions: 1.1 (Recognition), 1.11 (Individual Agreements), 1.13 (New Stores and Remodels), 1.14 (New Jobs), 2.4 (Other Hiring), 2.5 (New Employee), 2.6 (Extra Work), 4.3.4 (Recall), 4.9 (Transfers), 4.10 (Part Time Employees), 5.9 (Union Business). (Exhibits K and N.)[18] The CBA contained express language precluding those sections from being applicable to the Santa Clara store.[19]

[18] The referenced contractual sections are *all* of the contract provisions cited by the Union in its various communications. To the extent that the Union also premised its request on *unspecified* contractual provisions (see Exhibit K), the General Counsel may not seek to use any such additional contractual clauses to support its relevance argument because Nob Hill would have no way of assessing whether the requested information would be relevant to any contract administration claim. However, ultimately it does not matter whether the Union relied on the cited provisions or uncited provisions because, for the reasons now discussed, none of the contractual provisions, whether referenced by the Union or not, had any applicability to the Santa Clara store.

[19] For this reason, it is not necessary to go through each and every contractual provision referenced by the Union to demonstrate that administration of the provision was not relevant to the information sought. Because there is general language precluding *any* section of the CBA (other than Section 1.13) from applying to the Santa Clara store, it is not necessary to review each cited section and determine whether the information requested is potentially relevant. Nonetheless, Nob Hill does not concede that the Union's contractual references, even if they were applicable, support its "administration" claim. For example, the Union cites Section 2.4 of the CBA which provides, in relevant part: "Whenever new employees are hired for jobs covered by this Agreement, or when employees are transferred to jobs covered by this Agreement...the Employer shall..." Obviously, the Santa Clara jobs are not "jobs covered by this Agreement" because as the General Counsel and Union acknowledge, the Union did not represent the Santa Clara employees at the time the information request was made. (Fact 27; Exhibits V and X.) If the ALJ were to analyze each of

Section 1.13 of the CBA provides, in its entirety, as follows:

> **NEW STORES AND REMODELS**: During any three (3) consecutive days preceding the reopening of an old food market or discount center of the Employer, which has been closed for remodeling for a period of thirty (30) days or less, upon prior notice to the Union, persons *not in the bargaining unit may perform any work* in such store.
>
> *Notwithstanding any language to the contrary contained in this Agreement between the parties, it is agreed this Agreement shall have no application whatsoever to any new food market or discount center until fifteen (15) days following the opening to the public of any new establishment*. Neither shall this agreement have any application whatsoever to any new food market or discount center which is reopened after it has been closed for a period of more than thirty (30) days until the fifteenth (15^{th}) day following the date of such reopening to the public.
>
> *The Employer shall staff such new or reopened food market with a combination of both current employees and new hires*, in accordance with current industry practices of staffing such stores *with a cadre of current employees possessing the necessary skills, ability and experience, plus sufficient new hires to meet staffing requirements*. Employees, who are thus transferred, *upon whom contributions are made to the various trust funds*, shall continue to have contributions to the several trust funds made on their behalf in the same manner and in the same amount per hour as such contributions were made prior to their transfer.
>
> *Notwithstanding anything in this Agreement to the contrary*, it is agreed that when the remodeling of an existing location occurs without such store being closed, the Employer shall only be obligated to give the *members of the bargaining unit* employed by him in such store an opportunity to perform the work required for such remodeling at the applicable contract rate, except that such opportunity to perform such work shall not include any overtime hours. *When members of the bargaining unit are not available for such work, persons not in the bargaining unit may perform such work*.
>
> Notwithstanding anything to the contrary contained in this Agreement between the parties, it is agreed and understood that the probationary period for any new hires in such new or reopened stores referred to above shall not begin *until the fifteenth (15^{th}) day following such opening or reopening of such stores to the public*.
>
> (Exhibit J.) (emphasis added.)

The second paragraph of Section 1.13 *flatly states* that the CBA *has no applicability to the Santa Clara store (or any new Nob Hill store) until it has been open to the public for 15 days*. The use of the phrase "Notwithstanding anything in this Agreement to the contrary..." makes it

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the cited contractual provisions, the identical legal conclusion would result.

abundantly clear that no contractual provision *found elsewhere in the CBA* (other than Section 1.13) can be applied to the Santa Clara store. Thus, the Union's assertion that it needed the information to administer Sections 1.1, 1.11, 2.6. 1.14, 2.4, 2.5, 4.3.4, 4.9, 4.10, 5.9 of the CBA is factually incorrect because Section 1.13 made those provisions inapplicable to the Santa Clara store *as of the date of the Union's request*. Based on Board law detailed above, if the contractual provisions have no applicability to the Santa Clara store then the requested information concerning the Santa Clara store cannot be used to "administer" such provisions.[20]

1. THE GENERAL COUNSEL'S ATTEMPT TO CIRCUMVENT THE "NOTWITHSTANDING" LANGUAGE OF SECTION 1.13 MUST BE REJECTED AS CONTRARY TO ESTABLISHED SUPREME COURT PRECEDENT.

The words of Section 1.13 could not be clearer: *notwithstanding any language to the contrary in the CBA, the CBA has no applicability to a new store until it has been open to the public for 15 days*. The General Counsel rejects this contractual interpretation asserting that the information sought is relevant to the performance of the Union's duties as the employees' bargaining representative. (Exhibit E, ¶10.)[21] The General Counsel essentially contends that the

[20] To the degree that the Union sought information to administer Section 1.13 that issue will be discussed in the next section of this Brief. Suffice it to note at this juncture that Nob Hill *agreed* that the Union would be entitled to information pertaining to Nob Hill's compliance with the requirements of Section 1.13 but only after the Santa Clara store had been open to the public for 15 days. (Exhibit L.)

[21] The Complaint does not identify which specific contract provisions are applicable to the information request, leading to the conclusion that the General Counsel believes that all of the contractual provisions cited by the Union are applicable, including such sections as those dealing with recognition (section 1.1) or union business (section 5.4) even though the information requested has no relationship to any claim that could arguably be raised under those contractual provisions. Nor did the Union ever set forth *any facts* supporting any potential contractual violations based on these provisions. Presumably, in his Brief, Counsel for the General Counsel will attempt the impossible task of seeking to correlate the information requested with (1) a *specific contract claim* and (2) with *specific facts underlying the claim enunciated by the Union and disclosed to Nob Hill*, as required by *Disneyland Park, supra*.

"notwithstanding" proviso of Section 1.13 does not preclude the applicability of other contractual provisions to the Santa Clara store.

The General Counsel's argument not only seeks to deprive Nob Hill of the benefit of the contractual language it negotiated but does violence to *settled rules* of common law contract interpretation. The General Counsel simply makes up his own "special" rules for how this CBA should be interpreted in order to justify requiring Nob Hill to comply with the Union's information request – rules that are inconsistent with ordinary principles of common law.

As the Supreme Court has *repeatedly* made clear, the terms of a collective bargaining agreement *must be interpreted* under *ordinary principles of common law*. *CNH Industrial N.V. v. Reese*, 583 U.S. __, 138 S.Ct. 761 (*per curiam*) (2018) (rejecting the application of contractual inferences applied to a collective bargaining agreement that are contrary to common law principles).[22] Moreover, while the Board may interpret a collective bargaining agreement in the context of adjudicating an unfair labor practice, an interpretation that is inconsistent with common law principles is *not* entitled to deference. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 202 (1991):

> "Although the Board has occasion to interpret collective bargaining agreement in the context of unfair labor practice adjudication [citation omitted] the Board is neither the sole *nor the primary source* of authority in such matters. 'Arbitrators *and courts* are still the *principal sources of contract interpretation*.' [citation omitted] Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. §185, 'authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements.' [citation omitted] We would risk the development of conflicting principles were we to defer to the Board in its interpretation of the contract... *We cannot accord deference* in contract interpretation here only to revert to our independent interpretation of collective bargaining agreements in a case arising under §301. [citation omitted]" (emphasis changed.)

In other words, the General Counsel is not free to impose his own view as to how Nob

[22] This Supreme Court holding dates back more than sixty years. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457 (1957). The citations to this rule are so numerous as to fill pages. *E.g., M&G Polymers USA, LLC v. Tackett*, 574 U.S. __, 135 S. Ct. 926 (2015).

Hill's CBA should be interpreted or to give it an interpretation that is contrary to ordinary common law principles of contract interpretation.[23] To prevail in this case, the General Counsel must prove that, *under ordinary principles of common law*, the contractual clauses referenced by the Union that underlie its information request can be applicable to the Santa Clara store.

Here, Nob Hill's CBA provides: "*Notwithstanding any language to the contrary contained in this Agreement* between the parties, it is agreed this Agreement shall have no application *whatsoever* to any new food market or discount center *until fifteen (15) days following the opening to the public* of any new establishment." It is an established principle of common law that use of the term "notwithstanding" is intended to "trump" *all other aspects of an agreement or statute*. As held by the Supreme Court in *NLRB v. SW General*, __ U.S. __, 137 S. Ct. 929, 939 (2017):

> "The ordinary meaning of 'notwithstanding' is 'in spite of,' or 'without prevention or obstruction from or by'. Webster's Third New International Dictionary 1545 (1986); Black's Law Dictionary 1091 (7th ed. 1999) ('Despite; in spite of'). In statutes, *the word 'shows which provision prevails in the event of a clash'*."
>
> (emphasis added.)[24]

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[23] The Board must follow Supreme Court precedent and cannot acquiesce to a contractual interpretation that is unique to the General Counsel and that contravenes such precedent.

[24]As the General Counsel may argue here, in *SW General* the Board argued that the "notwithstanding" clause only applied to one statutory subsection of the statute and that, therefore, Congress, by singling out one subsection, did not intend the "notwithstanding" clause to apply *to other sections of the statute*. The Supreme Court easily rejected that argument stating:

> "The force of any negative implication, however, depends on context.' [citation omitted] The *expressio unius* canon only applies when 'circumstances support a sensible inference that the term left out must have meant to be excluded. [citation omitted] A 'notwithstanding' clause *does not* naturally give rise to such inference; *it just shows which of two or more provisions prevails in the event of a conflict*. Such a clause *confirm*s rather than constrains *breath*. Singling out one potential conflict might suggest that Congress thought the conflict was particularly difficult to resolve, or was quite likely to arise. *But doing so generally does not imply anything about other, unaddressed conflicts*, much less that they should be resolved in the opposite manner." (emphasis changed) *Id.* at 940.

As the cases discussed next demonstrate, the courts have *uniformly* rejected all attempts to

Although *SW General* was a statutory interpretation case, the Supreme Court has applied the identical reasoning *when interpreting contracts* that also contain a "notwithstanding" proviso. In *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 17 (1993), the Supreme Court was directly confronted with the question of whether a contractual "notwithstanding" clause trumped all other contractual provisions, *even those that arguably could apply*.

In *Cisneros*, the contract provided that "notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; ..." *Id*. at 14. Landlords argued that this "notwithstanding" language did not preclude increased rents based on the contract's "automatic adjustment" language. The Supreme Court rejected that argument finding the *contractual "notwithstanding" clause* trumped *all* other contractual provisions stating:

> "*As we have noted previously in construing statutes*, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section *override conflicting provisions of any other section*. *See Shomberg v. United States,* 348 U.S. 540, 547-548 (1955). Likewise, the Courts of Appeals generally have 'interpreted similar "notwithstanding" to supersede all other laws, stating that "a clearer statement is difficult to imagine."' [numerous courts' of appeals citations omitted] Thus, we think it clear beyond peradventure that §1.9(d) [the notwithstanding language] provides that contract rents 'shall not" be adjusted...*even if other provisions of the contracts might seem to require such a result*."
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> 508 U.S. at 18 (Citations omitted and emphasis added.)

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circumvent a "notwithstanding" clause. That result should be expected inasmuch as lawyers routinely use a "notwithstanding" clause to ensure that other contractual provisions do not apply. If the courts were to give such clauses a less encompassing meaning, lawyers would be forced to go through contracts, provision by provision, and state their applicability, or lack thereof, to particular circumstances.

Under common law principles, the case law *uniformly* stands for the proposition that when contracting parties use the term "notwithstanding" they intend that specific contractual provision to *prevail over all other potentially conflicting provisions* in their contract.[25] As the Ninth Circuit held in *F.B.T. Productions, LLC v. Aftermath Records*, 621 F.3d 958, 964 (2010):

> "The parties use of the word 'notwithstanding' plainly indicates that even if a transaction arguably falls within the scope of the Records Sold provision, F.B.T. is to receive a 50% royalty if Aftermath licenses an Eminem master to a third party for 'any' use."

The California Supreme Court reached the identical conclusion in *Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal. 4th 495, 502 (2005) stating:

> "The first sentence of the arbitration clause expressly declares that, 'Notwithstanding any other items set forth herein, the parties hereby agree that any dispute which arises shall be settled in Binding Arbitration.' The phrase 'notwithstanding any other item' clearly indicates that the parties intended the arbitration clause to apply according to its terms and for all disputes to be settled in binding arbitration, *even if other provisions, read in isolation, might seem to require a different result*. No ambiguity exists. Boghos advances several arguments against this conclusion. None is persuasive." (emphasis added.)[26]

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[25] The State and Federal cases holding that the use of the word "notwithstanding" trumps all other contractual provisions, whether or not other contractual provisions *arguably apply*, are voluminous. Because Nob Hill's CBA was executed in California and because Nob Hill can seek review of any adverse Board decision in the Ninth Circuit, Nob Hill will highlight holdings from the Ninth Circuit and the California Supreme Court. However, additional cases can be found by reviewing the Supreme Court's decision in *Cisneros* (as well as the case citations contained in those referenced cases). *Given the uniformity of this rule*, no purpose would be served in referencing all of these cases. However, two appellate cases are of additional interest because they *reject* creative attempts to avoid the "trumping" effect of a "notwithstanding" clause. *See Bank of New York v. First Millennium, Inc*., 607 F.3d 905 (2nd Cir. 2010) and *International Multifoods Corp. v. Commercial Union Insurance Company*, 309 F.3d 76 (2nd Cir. 2002). Suffice it to say, in arguing that the "notwithstanding" language in Section 1.13 does not mean what it plainly says, the General Counsel will be unable to find cases that establish such a proposition as a *common law rule of interpretation*. The General Counsel is asking the ALJ to give the parties' CBA a "special meaning" in contravention of this uniform Supreme Court, federal court, and state court precedent.

[26] Like the California Supreme Court in *Boghos*, in *F.B.T. Productions, LLC v. Aftermath Records*, the Ninth Circuit also rejected the argument that such an interpretation makes a contract ambiguous, thereby requiring resort to extrinsic evidence, because the "notwithstanding" provision is broad in scope and effect. The Court stated: "A contractual provision is not ambiguous just because it is broad", and further, "parole evidence is properly admitted to construe a contract only when it is ambiguous". 621 F.3d at 963.

Nob Hill negotiated the "notwithstanding" proviso to preclude the Union from arguing that *other CBA provisions* applied to any new stores Nob Hill opened. Yet when Nob Hill responded to the Union's information requests that the "notwithstanding" proviso contained in Section 1.13 meant that all of the contractual provisions referenced by the Union had no applicability to the Santa Clara store, the Union asserted, and the General Counsel apparently agreed, that the "notwithstanding" language did not mean what it said.

According to the Union and the General Counsel, the "notwithstanding" proviso has no real meaning, no less any teeth. Under their reading of the proviso, they are free to apply *any* contractual provisions they wish to the new Santa Clara store. The Union simply looks for language that is potentially applicable (for example, Section 1.14 which requires any new jobs created to be performed by unit employees) and asserts that the language is applicable to the Santa Clara store. The Union then bootstraps that claim, to argue that the information it is seeking is relevant to contract administration.

Under their analysis, there does not appear to be any limiting principle as to which contractual clauses apply to the new store. If the Union can find an arguable basis to assert that the contractual provision could apply, it asserts that the "notwithstanding" proviso has no applicability. That argument makes a mockery of the "notwithstanding" clause and flies in the face of uniform precedent to the contrary.[27]

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[27] Nor can the General Counsel succeed by asserting that the language is ambiguous, thereby allowing the Union's unsupported interpretation to prevail. As noted, the case law holds that a "notwithstanding" clause is neither overly broad nor ambiguous. *E.g., F.B.T. Productions, LLC v. Aftermath Records, supra.* A collective bargaining agreement is ambiguous only if "after applying established rules of interpretation, it remains susceptible to at least two reasonable but conflicting meanings." *CNH Industries NV v. Reese*, *supra*. *See also TRB Investments, Inc. v. Fireman's Fund Insurance, Co*., 40 Cal. 4th 19, 27 (2006). The contractual language must be interpreted as a whole and cannot be found to be ambiguous *in the abstract*. *Id*. Here, Nob Hill's

The bargaining parties chose this "notwithstanding" language precisely because it would be broad in scope and effect. The Union is not now free to renege on its contractual agreement. The "notwithstanding" language trumps all such applications and arguments.

C. NO PART OF SECTION 1.13 OF THE CBA WAS APPLICABLE TO THE SANTA CLARA STORE AT THE TIME OF THE UNION'S INFORMATION REQUEST, AND THE UNION DID NOT SET FORTH ANY SPECIFIC FACTS DEMONSTRATING A CURRENT CONTROVERY NOR DID IT SEEK INFORMATION RELEVANT TO A CURRENT DISPUTE.

If contract administration is the lodestar to establish the relevance of the Union's information request, the Union must point to some provision in the CBA which clearly and unequivocally survives the "notwithstanding" proviso and, just as importantly, *is applicable when the Union made its information demand*. In its December 19th letter, apparently anticipating the difficulty of its argument, the Union sought to base its information request on a need to administer Section 1.13 *itself*, presumably believing that if it could rely on the "notwithstanding" language

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"notwithstanding" proviso trumps all other contractual provisions so there cannot be a conflict, no less two reasonable conflicting constructions.

Moreover, if the contractual language is unambiguous, as a matter of law, parole evidence cannot be used to explain or clarify the contractual language. *E.g., U.S. v. Johnson*, 43 F.3d 1308, 1310-11 (9th Cir. 1999). Unambiguous language in a collective bargaining agreement must be strictly enforced. *E.g., Contempo Design v. N.E. Illinois Carpenters*, 226 F.3d 535, 546 (7th Cir. 2000). These are common law rules of contract interpretation, binding on the Board under *Textile Workers v. Lincoln Mills, sup*ra, and its progeny. In any event, the General Counsel has introduced no evidence to support a claim of ambiguity. *See International Union v. Skinner Engine Co*., 188 F.3d 130, 145 (3rd Cir. 1999) (burden on the union to establish ambiguity).

But even if the ALJ were somehow convinced to ignore this uniform precedent and resorted to extrinsic evidence to "clarify" the meaning of the contractual language, *the record contains no extrinsic evidence supporting the Union's claim* that these contractual provisions were previously applied to new Nob Hill stores. In truth, the evidence is to the contrary, and therefore, supports Nob Hill's construction. (Fact 28.) *See Fibreboard Paper Products Corp. v. East Bay Union*, 227 Cal. App. 2d 675, 724 (1964) (in the case of an ambiguous contractual term "...the construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen over its meaning, is entitled to great weight...")

itself, then it could avoid the problem posed by the proviso.

The Union belatedly claimed that it needed the information because Section 1.13 (1) required the new store to be staffed "with a cadre of current employees; (2) required Nob Hill to make trust fund contributions on behalf of transferred employees; and (3) established a probationary period for new hires commencing on the 15th day the store was opened to the public. (Exhibit P.)[28]

1. THE SECTION 1.13 CADRE STAFFING OBLIGATION WAS INAPPLICABLE UNTIL THE STORE WAS OPEN TO THE PUBLIC FOR FIFTEEN DAYS, AND IN ANY EVENT, IT DID NOT REQUIRE NOB HILL TO FOLLOW ANY SPECIFIC CONTRACTUAL PROCEDURE WHEN STAFFING THE NEW STORE.

While Section 1.13 did impose on Nob Hill an obligation to staff the Santa Clara store with a "cadre" of existing employees, the obligation only exists as of the date the store has been open to the public for 15 days. *For the first 15 days, Nob Hill did not have to use a single existing employee to staff the store*. Until the fifteenth day, Nob Hill had no contractual staffing obligations. It is only on the 15th day that the Union could demand to see if Nob Hill was in compliance. In other words, on that date, the Union had a "look see" contractual right to determine if Nob Hill had complied with the cadre-staffing obligation. At that point, and only that point, could the Union assert a *potential contract violation* – a condition necessary to establish relevance. *E.g., Disneyland Park, supra*.

Second, Section 1.13 says absolutely nothing about how Nob Hill goes about obtaining the cadre of employees (e.g., by asking employees to transfer, by soliciting transfers, or by forcing employees to transfer). Section 1.13 say nothing about the procedure or process that Nob Hill

[28] The Union's letter makes numerous references to supposed "industry practice". There is no evidence in this record of any industry practice. There is evidence (1) as to Nob Hill's past practice concerning how it staffed its new stores, (2) the fact that the Union never contended that Nob Hill's practice was violative of the CBA, and (3) the fact that the Union never sought any information to administer contractual provisions which it knew were inapplicable. (Fact 28.)

would follow, or was required to follow, in establishing the cadre.

This point bears emphasis. The Union and General Counsel seemingly believe that because Section 1.13 requires the new store to be staffed with a cadre of existing employees that necessarily means that it may then apply any of the staffing provisions found *elsewhere in the CBA* to the Santa Clara store. The two concepts are not logically connected, and the argument ignores the "trumping" effect of the "notwithstanding" proviso.

Nothing in Section 1.13 dictates how Nob Hill will go about meeting its staffing obligation. No particular practice, policy, or procedure is dictated by Section 1.13. The process selected is solely up to Nob Hill – a fact confirmed by the parties' past practice and the Union's failure to ever object to that practice. While Nob Hill was required to staff the new store with a cadre of existing employees, *how Nob Hill accomplished that result was not contractually compelled or specified*.

Section 1.13 does not even require that the "cadre" of employees be unit employees.[29] Nob

[29] This is an important distinction. Section 1.13 required Nob Hill to staff a new food store with a combination of *both current employees* and new hires, in accordance with current industry practices of staffing such stores with a cadre of current employees possessing the necessary skills, ability and experience, plus sufficient new hires to meet staffing requirements. While the Union argued that the "cadre" must come from the bargaining unit, the CBA did not include that requirement. The CBA simply referenced "employees". In stark contrast, when the parties intended to limit Section 1.13 to bargaining unit employees, they specifically referenced the bargaining unit. For instance, the fourth paragraph of Section 1.13 states: "Notwithstanding anything in this Agreement to the contrary, it is agreed that when the remodeling of an existing location occurs without such store being closed, the Employer shall only be obligated to give the *members of the bargaining unit* employed by him in such store an opportunity to perform the work required for such remodeling at the applicable contract rate, except that such opportunity to perform such work shall not include any overtime hours. When members of the bargaining unit are not available for such work, such work may be performed by persons not in the bargaining unit." (See also (1) the first paragraph of Section 1.13 which makes reference to the "bargaining unit" when discussing which employees can perform certain work; and (2) Section 1.14 which requires "bargaining unit" members to perform any new work.)

In other words, the negotiating parties were clearly capable of distinguishing between bargaining unit employees and all other employees when they wrote Section 1.13. Their failure to specify that the "cadre" must come from the bargaining unit was a frank acknowledgement that in light of Nob

Hill was free to obtain the cadre from any food stores and did, in the past, as well as with respect to the Santa Clara store, solicit employees from all of its affiliated stores. (Facts 23 and 28.) The CBA did not impose upon Nob Hill any contractual limitations, rules, or procedures in how Nob Hill complied with its staffing obligation.

Under Board law, to demonstrate relevance for contract administration purposes, the Union must set forth *specific facts* showing the *potential breach of a contract provision*. *Disneyland Park, supra*. But, if the Union relies solely on Section 1.13 to assert a contract violation (because all other sections of the CBA are inapplicable) what *specific language* in Section 1.13 was Nob Hill violating *at the time* of the Union's information request? The Union and General Counsel are ultimately forced to assert that Nob Hill was, at that time, in violation of other contractual provisions – an argument that Section 1.13 forecloses.

Hill's accepted practice of only using volunteers to staff a new store, the cadre might not come from the bargaining unit. The Union was not concerned from which stores the cadre came from, because the vast majority of stores in the Raley's family of stores were union stores. (Exhibit W.)

The language in Section 1.13 requiring that Nob Hill continue making pension trust fund contributions on behalf of transferred employees is also supportive of this interpretation. It states: "Employees, who are thus transferred, *upon whom contributions are made to the various trust funds*, shall continue to have contributions made on their behalf in the same manner...as such contributions were made prior to their transfer." (Exhibit J.). By using the phrase, "upon whom contributions are made", the parties explicitly acknowledged that there could be transfers for whom no such contributions had been made (otherwise the qualifying phrase had no purpose).

Any argument that the cadre *must* come from the bargaining unit is also disproved by the fact, that without protest, the new stores have always been staffed with individuals who volunteered to transfer. (Fact 28.) If no bargaining unit employee requested a transfer, none would have been transferred, and the cadre would have been composed of non-unit employees. Moreover, in every case, non-unit employees have transferred into a new Nob Hill store, and the Union never objected that such a practice was violative of the cadre staffing requirement. *Id*.

2. NOB HILL'S OBLIGATION TO MAKE TRUST FUND CONTRIBUTIONS ON BEHALF OF TRANSFERRED EMPLOYEES AND ITS OBLIGATION TO ESTABLISH A PROBATIONARY PERIOD FOR NEW HIRES WERE LEGALLY APPLICABLE ONLY IF THE UNION BECAME THE REPRESENTATIVE OF THE SANTA CLARA EMPLOYEES, AND UNTIL THEN, THE UNION COULD NOT LAWFULLY "ADMINISTER" THESE CONTRACT PROVISIONS.

The Union's reliance on Section 1.13's requirements that Nob Hill make pension trust fund contributions on behalf of transferred employees and/or that Nob Hill establish a probationary period for new hires also does not support the Union's contract administration argument. These contractual mandates could be legally effective *only* if the Union became the collective bargaining representative of the employees in the Santa Clara store.

In the past, Nob Hill and the Union reached an accommodation whereby they agreed, in advance, that if the Union obtained proof of its majority status at a new store, Nob Hill would extend recognition to the Union. (Fact 28F.) As a result, each newly opened Nob Hill store was unionized. *Id*. Because of this practice, the CBA contained *contingency* clauses *in anticipation that the Union would become, shortly after the store opened to the public, the employees' bargaining representative*.

Specifically, the CBA provided that trust fund contributions would be made on behalf of any *unit employee* who transferred to the new store while the parties negotiated a "pension transition". (Exhibit J: Sections 1.1 and 1.13.) Additionally, the CBA provided that any probationary period for new hires would not commence until the store had been open to the public for 15 days. (Exhibit J: Section 1.13.) However, under the Act, neither of these contingency clauses could be legally effective *until and unless* the Union became the representative of the Santa Clara employees.[30] The Union acknowledged this point when Nunes conceded that if the Santa

[30] As matter of law, a union cannot become the representatives of a new retail store until a representative complement of employees are working in the store, to wit, after the store becomes

Clara store remained non-union, the unit employees who transferred would no longer be covered by the Union pension plan. (Exhibit R.)[31] If these contractual provisions were inapplicable at the time of the Union's information request, then they cannot be relied upon by the Union to claim that the information was needed to administer these clauses.[32]

The General Counsel conceded this legal conclusion when he dismissed a portion of the Union's unfair labor practice charge. The Union "had sought a list of the job classifications and the number of employees in each classification, complete with full-time and part-time designation, for those employees in [Nob Hill's] employ two months and six months after the new store opened". (Exhibit K.) The General Counsel concluded that Nob Hill's refusal to provide this information was not violative of the Act inasmuch as the "request was premature because the store had not yet opened and it was not clear that the [Union] would be the Section 9(a) representative and thus entitled to that information." (Exhibit V.)

Similarly, the Union cannot use CBA provisions that are legally effective (1) only if the Union becomes the Santa Clara employees' bargaining representative and then (2) only after the store is open to public to assert it is *presently* administering its CBA. The Union's information

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operational. *E.g., The Englander Company, Inc.,* 114 NLRB 1034, 1042, (1955) *enf'd den. on other grounds* 237 F.2d 599 (3rd. Cir. 1956). Moreover, *no pre-negotiated contractual terms* can be applied to the new employees until the union demonstrates its majority status. *See generally Kroger Co.*, 219 NLRB 388 (1975) and *Dana Corporation*, 356 NLRB 256 (2010). Therefore, these *anticipatory* contract clauses were not legally effective or binding on Nob Hill unless the Union became the representative of the Santa Clara employees.

[31] Nunes wrote: "For example, employees in the pension plan will cease to be participants which will impact their retirement income and will have serve negative effects on their retiree medical eligibility. " (Exhibit U.)

[32] Nob Hill's offer to consider any information request made by the Union after the store was open to the public for fifteen days was the appropriate response. At that juncture, if the Union was the representative, then it could ascertain whether Nob Hill was in compliance with these contractual provisions.

request is judged for relevance as of the time the request is made. *Kraft Foods North America, Inc., supra*. At the time it made its request, the Union had *no present or current* need for the information. The Union's request was, at best, premature.[33] Until the store was open to the public and the Union became the employees' representative, there was no contractual provision to administer. Indeed, administering those two contractual provisions, prior to recognition, *would violate the Act*.[34]

3. ASSUMING *ARGUENDO* THAT SOME OR ALL OF SECTION 1.13 WAS SUBJECT TO A CLAIM OF CONTRACT ADMINISTRATION, THE UNION NEVER MET ITS OBLIGATION OF ESTABLISHING THE RELEVANCE BETWEEN THE PROVISION IT SOUGHT TO ADMINISTER AND THE INFORMATION IT REQUESTED.

Even if the General Counsel were to succeed in demonstrating that the Union's information request was not premature and the Union had a contractual right to administer Section 1.13, the General Counsel still cannot prevail because the Union did not satisfy the Board's relevancy test requirements.[35]

First, at no point, did the Union set forth specific facts showing how Nob Hill was violating Section 1.13. Indeed, no such facts were disclosed to Nob Hill. If the Union was really seeking to

[33] Assuming *arguendo* the *then current* effectiveness of the pension contribution and probationary period clauses, the Union's request would still have been premature because the obligation to make pension fund contributions and to establish a probationary period did not exist until the store opened to the public. Just as was the case with the cadre language, at the time of the Union's request, there was no contractual provision to enforce because these provisions were not yet applicable. Therefore, here again, the Union could not enunciate a *present* contractual violation that it was seeking to investigate or pursue, a Board requirement to establish relevance.

[34] In its December 13th letter to the Union, without elaborating on the point, Nob Hill noted that the Union's contractual interpretation, in seeking to apply these provisions to the new store *prior to recognition* being granted, ran "afoul" of the Act. (Exhibit O, n. 3.)

[35] This argument is included only to "cover all bases". It need only be addressed by the ALJ if it is concluded that the Union had a lawful (and then current) right to administer the provisions of Section 1.13.

administer Section 1.13, the Union was required to set forth *specific facts showing that specific contract violation*. *Disneyland Park, supra*, 350 NLRB at 1259 ("...the union *must claim* that a specific provision of the contract is being breached and must set forth at least *some facts* to support that claim.") Moreover, the facts upon which the Union's relies must have an objective basis; they cannot simply be "made up" to support the Union's information demand. *Bohemia, Inc*., 272 NLRB 1128, 1129 (1984). Here, the Union set forth no objective facts demonstrating an alleged failure to make pension fund contributions, an alleged failure to establish a probationary period, or an alleged failure to staff the store with a cadre.[36]

Second, the information sought by the Union must be relevant to the contract provision it is seeking to administer. *E.g., IronTiger Logistics, supra*. There must be a logical connection between the information sought and the contract provision to be enforced. The two must be connected for relevance to be shown. *Id*. Here, none of the information requested by the Union went to the issue of whether Nob Hill was potentially breaching Section 1.13.

The vast majority of the information requested by the Union concerned the wages and working conditions in the Santa Clara store. The remaining information requested concerned the ability of unit or non-unit employees to obtain work in the Santa Clara store. Not a single request asked Nob Hill to provide evidence of pension fund contributions being made, or sought to identify the cadre of employees *actually working* in the store, or sought evidence that Nob Hill had established a probationary period for "new hires". Those are the types of requests that would have been made to ascertain whether Nob Hill was potentially breaching the requirements of Section

[36] The facts, if that is what they are, that the Union enunciated concerned Nob Hill's failure to comply with other contractual provisions, such as an alleged failure to consider employees for transfer. The alleged failure to transfer was legally insufficient (1) because it was objectively untrue (and the Union therefore had no objective evidence supporting its claim), and (2) because the CBA did not require Nob Hill to obtain the cadre from the bargaining unit.

1.13.

Obviously, the Union made no such requests because such requests would have been nonsensical. If the store was not yet staffed, obviously, there would be no pension fund contributions to make, no probationary period to establish, and no ability to determine if a cadre of current employees was working in the store. Yet, again, this points out the premature nature of the Union's request.

D. THE UNION NEVER SERIOUSLY SOUGHT THE INFORMATION FOR THE PURPOSE OF "EFFECTS BARGAINING", NEVER REQUESTED TO ENGAGE IN EFFECTS BARGAINING, AND NEVER IDENTIFIED ANY POSSIBLE ADVERSE EFFECT BECAUSE THERE WAS NO SUCH EFFECT.

As an alternate basis for seeking the information, the Union claimed that it needed the information to engage in "effects bargaining". (Exhibit K.) Not much need be said about this argument because the Union never seriously contended that the information sought was for "effects bargaining" nor did it ever ask Nob Hill to engage in "effects bargaining. The Union's solitary reference to "effects bargaining" was nothing more than a throw away line.

The Union never explained how the opening of the Santa Clara store would adversely impact the current unit employees such that the requested information would be relevant to "effects bargaining" nor did it seek to engage in "effects bargaining" where it could have explained and detailed its claim.[37] Moreover, as demonstrated by its follow-up communications, the Union *never again claimed* that it needed the information to engage in "effects bargaining". In *all of the Union's subsequent communications* it asserted that the information was needed to administer the CBA.

[37] Prior to opening the store in the City of Santa Clara, Nob Hill operated five other stores in Santa Clara County -- in Gilroy, Morgan Hill, Campbell, San Jose, and Mountain View. (Exhibit W.) These Union stores were literally miles away from the new Santa Clara store and were not in competition with the Santa Clara store. The likelihood of any adverse effect was nil.

(Exhibits M, N, & P.)[38]

Given that Nob Hill repeatedly claimed that no contractual provision was applicable, it would have been a simply matter for the Union to counter, "nonetheless, the information is necessary for effects bargaining", or alternatively, to demand that Nob Hill engage in "effects bargaining". The Union did neither.

More importantly, given the *nonunit* information requested, under Board law, it was not sufficient for the Union make an unsupported claim that the information was needed for "effects bargaining". Because there was no known or obvious adverse impact on the bargaining unit, the relevance of the Union's information request would not be "apparent from the circumstances. The Union was, therefore, required to make the relevance of the information it sought known to Nob Hill. *Disneyland Park, supra* 350 NLRB at 1258. The Union did not do so in any of its communications, and because the Union never engaged Nob Hill in "effects bargaining", the Union never provided Nob Hill with this information at the bargaining table.

The Union cannot simply invoke the incantation "effects bargaining" to demonstrate relevance. A general claim for information does not satisfy the Board's relevancy test. *F.A. Bartlett Tree Expert, supra*, 316 NLRB at 1313; and *see NLRB v. Wachter Construction, Inc*., 23 F.3d 1378 (8th Cir. 1994) (boilerplate claims that information is needed are insufficient to establish relevancy). As the Board has held: "The union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." *Disneyland Park, supra*, 350 NLRB at 1258 n. 5 (citations omitted); and *see also Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314 (1979).

[38] The fact that "effects bargaining" was a "throw away" reference and was not seriously made is further shown by the fact that, in that same sentence, the Union asserted that Nob Hill had an obligation to bargain *over the decision to open the Santa Clara store*. (Exhibit K.) No such legal obligation exists. *First National Maintenance v. NLRB, supra.*

The Union was required to set forth an objective, factual basis to support its information claim. *Id.* Yet, here, the Union set forth no facts supporting its claim that there was an adverse effect. As far as Nob Hill knew, the opening of the Santa Clara store had no adverse impact on the bargaining unit.

- At the time of the Union's information request (and at all times thereafter), no unit member was on "layoff". (Fact 26.)
- No unit employee was laid off as a result of the opening of the Santa Clara store. *Id.*
- No unit employee suffered any loss of hours because of the opening of the Santa Clara store. *Id*.
- The new hours that became available, within the bargaining unit, were given to bargaining unit members. *Id*.

Accordingly, Nob Hill had no basis for believing that the information demanded was relevant to bargaining over a non-existent effect. A throw away line about seeking information for effects bargaining, that was never pursued, does not satisfy the Board's test for demonstrating that the requested information was relevant for the purpose for which the information was sought.

1. THE INFORMATION SOUGHT HAD NO LOGICAL OR RELEVANT CONNECTION TO ANY REQUEST TO ENGAGE IN EFFECTS BARGAINING.

Just as importantly, the information sought by the Union had no logical connection to any possible effects bargaining. The information requested did not pertain to any adverse effect (or to offsetting any adverse effect) but instead pertained to how Nob Hill would operate the Santa Clara store (i.e., what the wage rates, benefits and classifications would be, copies of the employee handbook, copies of benefit plans). To prevail, the General Counsel must show that there is a "logical relationship" between the requested information and a legitimate union purpose. *Sara Lee*

Bakery Group v. NLRB, supra, 514 F.3d at 431. When it comes to bargaining, the Union must show that the information is relevant to the bargaining taking place or *that will take place*. *Western Massachusetts Electric Co. v. NLRB*, 573 F.2d 101, 105 (1st Cir. 1978).

Applying these principles, the Board has declined to compel an employer to respond to an information request made for the purported purpose of engaging in effects bargaining, where the information requested was not logically connected to the adverse effect. *American Stores Packing*, *supra*, 277 NLRB at 1658 ("...none of the information requested is particularly relevant to the effects of a decision to close.").

Here, the Union's information request had no logical connection to any adverse effect. How is a copy of the employee handbook applicable to the Santa Clara employees relevant to any adverse impact on the bargaining unit? How are the wage rates and benefits of the Santa Clara employees logically related to any adverse effect? How is *any* of the information requested by the Union related to *any* adverse effect? No explanation was forthcoming from the Union at any time in any of its communications, and on its face, there is no logical connection. *See Island Creek Coal Co*., 292 NLRB 480. 490 (1989) ("...we do not find that the relevance of any of these documents would have been obvious to the Respondents under the circumstances under which the *initial* requests were made.") (original emphasis).[39]

[39] Counsel for the General Counsel might argue that the ability to obtain a transfer to the Santa Clara store would be "effect" over which the Union might wish to bargain, and accordingly, the information that the Union sought about "transferring" was relevant to such potential bargaining. There are three problems with that argument. First, not only did the Union never make such a claim but such an argument is *contrary to the claims the Union made*. The Union continually asserted that unit employees, under the terms of the CBA, had *a pre-existing contractual right to transfer*. (Exhibits N and P.) A union does not engage in "effects bargaining" over a contractual right it asserts *it already possesses*. Second, even if such a tortured interpretation of the Union's statements were adopted, there was nothing to bargain over concerning the ability of unit employees to transfer to Santa Clara. All bargaining unit members were notified of the availability of job openings in Santa Clara and were invited, by Nob Hill, to apply for those positions. (Fact

Even if the Union was sincere about a wish to engage in effects bargaining, the information it requested did not pertain to any such bargaining, and therefore, was not relevant, or alternatively, the relevance of the requested information was not made known to Nob Hill. Therefore, Nob Hill had no obligation to provide this information to the Union.

E. THE UNION'S DESIRE TO COUNSEL EMPLOYEES ABOUT THE CONSEQUENCES OF TRANSFERRING, NO MATTER HOW LAUDATORY, IS NOT PART OF A UNION'S STATUTORY DUTIES, AND THEREFORE, DOES NOT MAKE THE INFORMATION SOUGHT RELEVANT UNDER BOARD LAW.

Although not directly labeled an effect, the Union also asserted that because unit employees might transfer to the Santa Clara store, that fact alone, entitled the Union to information so it could "counsel" the employees. Nunes stated:

> "On the other hand, if Raley's employment recruiters are informing Local 5 members the store will be a non-union operation it is important they have all the facts before making such an important decision. It is not possible for the Union to educate current Local 5 Nob Hill members of the possible pitfalls of accepting such a transfer if we do not know prospectively the Union members choosing to go to the new store. For example, employees in the pension plan will cease to be participants which will impact their retirement income and will have serve negative effects on their retiree medical eligibility. It is also important to receive impartial information from the Union on the differences in medical plans offered by the company compared to medical benefits provided under the Union Trust Fund plan."
>
> (Exhibit R.")

10.) *The Union was aware that Nob Hill was soliciting unit members to transfe*r, and the Union also encouraged the employees to seek a transfer. (Exhibit U.) Obviously, a union does not bargain to obtain something an employer is already providing the employees. (Fact 23.) Third, no unit employee lost any work hours. (Fact 26.) Only if unit employees were losing work would an adverse effect exist such that the Union might be entitled to bargain about the ability of unit employees to transfer. Seeking the ability to transfer would not be a valid objective of effects bargaining where the opening of the Santa Clara store caused no loss of bargaining unit work hours. In other words, the Union would not be bargaining to offset an adverse effect – the only valid and legal purpose of "effects bargaining". While the Union did assert that there are "many...members who wish to transfer" and that if those members were transferred then existing part time employees would be able to work additional hours, as the parties have stipulated, this claim was untrue. (Fact 23 and Exhibit N.) The Union is required to have *an objective basis* to support its relevancy claim. *Bohemia, Inc*., *supra*.

Whatever the value of such counseling, the fact is that "counseling" employees is not one of the Union's statutory duties. A union is only entitled to information to support its statutory obligations. *Southern California Gas Company, supra;* and *WXON-TV, Inc*., *supra*. Providing unit employees with information regarding the alleged "pitfalls" *of leaving the bargaining unit* is not administering any contractual provision (nor is it bargaining). Therefore, while the information sought might be relevant to the Union's wish to counsel employees, such information, under Board law, is irrelevant to the Union's statutory obligations, and Nob Hill was under no legal duty to provide the Union with the requested information.[40]

F. <u>THE INFORMATION SOUGHT WAS ACTUALLY INTENDED TO AID THE UNION IN ORGANIZING THE SANTA CLARA STORE.</u>

Plainly speaking, the Union sought this information, not for its stated reason to administer the CBA or to deal with some mythical adverse effect resulting from the store's opening, but rather for the purpose of assisting it in organizing the store. In the past, Nob Hill and the Union have reached an accommodation whereby they agreed, in advance, that if the Union obtained proof of its majority status, Nob Hill would extend recognition to the Union without the necessity of an NLRB election. (Fact 28F.) As a result, each newly opened Nob Hill store was unionized. *Id*. In the case of the Santa Clara store, Nob Hill declined to enter into such an advance agreement and advised the Union that it would insist upon an NLRB conducted election before granting it recognition. (Fact 28G.)

[40] It should not go unstated that the Union had no real need for such information to counsel the employees. The Union was fully aware that transferring employees would lose their union pension plan and health insurance if they went to work in a non-union Nob Hill Store. (Exhibit R.). Thus, the Union was fully capable of advising the employees of the pitfalls of accepting a transfer. But, rather than do so, the Union encouraged its members to seek a transfer. (Exhibit U.) The Union's asserted need for this information to counsel employees was bogus.

Aware that Nob Hill would no longer continue this practice, the Union still intended to organize the store and obtain for the Santa Clara employees the same CBA that covered all other Nob Hill employees. Nunes made that precise point when he told his members in October 2017:

> "Local 5 fully expects the new Nob Hill to be a union establishment with all the same benefits of excellent wages, health care benefits and working conditions existing in all Nob Hill stores in Local 5's area." (Exhibit U.)

While Nunes was less direct in his December 27th communication to Raley's, he again made it clear that it was the Union's wish to maintain the Union's long standing relationship with Raley's, presumably by Nob Hill agreeing to extend its practice of recognizing the Union by means of a card cross-check. (Exhibit R).

Confronted with Nob Hill's refusal to extend its past practice of recognition, the Union sought information that would assist it in organizing the store. It sought the names of the individuals who were requesting transfer – which would make it easy for the Union to encourage them to transfer so that they could assist in organizing the store. It sought the names of the employees who were going to transfer so that they would do the organizing. It sought to learn the planned wage and benefit package offered to the Santa Clara employees so that it could compare its CBA package to Nob Hill's "non-union" package to argue the advantages of unionization. Finally, it sought to obtain the ability to refer existing non-unit union members for work so that they, too, could assist in organizing the store. Each and every information request was *targeted to aid the Union in organizing the new store*, not administering any contractual provision.

Never before had the Union sought any information from Nob Hill concerning the opening of a new store. (Fact 28E.) Not once did the Union request any sort of information from Nob Hill regarding the terms and conditions under which the transferring employees would work. Not once did the Union seek the identities of the employees who were transferring to the new store. *Id*.

With respect to these previous store openings, the Union never asserted that Nob Hill had failed to comply with any contractual provision even though, with respect to those store openings, Nob Hill followed the identical practices it followed when it opened its Santa Clara store. (Fact 28.)

It was only this time, when Nob Hill stated that it would no longer grant the Union recognition based on a card check, that *suddenly* all of these contractual provisions were applicable to the new store. It is not necessary for the ALJ to conclude that the Union was acting in bad faith. It is sufficient to note that the Union had another purpose for obtaining this information, and in the absence of proven relevancy, and in light of the parties' past practice, the Union was not administering any contractual provision or seeking to engage in effects bargaining about a non-existent adverse effect.

The simple truth is that Nob Hill successfully negotiated a contractual provision that precluded any provision of the CBA from having any applicability to the Santa Clara store. The General Counsel:

> (1) is not free to rewrite the CBA,;
>
> (2) is not free to ignore the contract's express language;
>
> (3) is not free to apply some "special" NLRB rule of contract interpretation and ignore common law rules of contract construction in contravention of Supreme Court precedent; and
>
> (4) is not free to deprive Nob Hill of the benefit of its hard-earned contractual bargain.

Nob Hill readily acknowledged its willingness to consider the Union's *timely* information request, made after the Santa Clara store was open to the public for 15 days. No such request was forthcoming because the Union insisted in obtaining the information it needed to aid it in

organizing the Santa Clara store. Nob Hill was within its contractual and legal rights in refusing to respond to the Union's premature information request.

V. CONCLUSION

For the aforesaid reasons, it is submitted that Nob Hill was under no legal obligation to respond to the Union's information requests at the time they were made. Accordingly, the Complaint should be dismissed in its entirety as lacking merit.

Dated: September 27, 2018

Respectfully Submitted,

s/ Henry F. Telfeian

Law Office of Henry F. Telfeian
By: Henry F. Telfeian
Attorney for Nob Hill General Stores, Inc.

CERTIFICATE OF SERVICE

This is to certify, under penalty of perjury under the laws of the United States, that on this date I served a true and correct copy of RESPONDENT'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE in Case Nos. 20-CA-209431 via electronic mail, to the email addresses listed below:

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This 27th day of September 2018

s/ Henry F. Telfeian

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